United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7012

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United States Court of Appeals

FOR THE SECOND CIRCUIT

RIDEL C. REVILLA,

Plaintiff-Appellant,

—against—

AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Defendant and
Third-Party Plaintiff-Appellee,

—against—

PITTSTON STEVEDORING CORP., and
HOFFMAN RIGGING AND CRANE [illegible],

Third-Party Defendants-Appellees.

PLAINTIFF-APPELLANT'S BRIEF

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TABLE OF CONTENTS

Table of Authorities

Cases: PAGE

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Preliminary Statement

Plaintiff-appellant's* causes of action for maritime negligence and the breach of defendant-appellee's non-delegable and absolute obligation of seaworthiness owed a longshoreman prior to the 1972 amendment of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905 (b), were dismissed by Richard H. Levet, D.J., following a jury's answers to three special interrogatories on liability. There

* Plaintiff-appellant and defendant-appellee will hereinafter be referred to as "plaintiff-" and "defendant". The third-party defendants will be referred to as "Pittston" and "Hoffman".

was no written opinion by the trial Judge. All parties rested after plaintiff's case. The claims over and cross-claims are in abeyance pending the outcome of this appeal.

Issues Presented for Review

Plaintiff contends that the fundamental errors of the trial Judge in rulings and in his Charge, on evidence and the applicable maritime law as to longshoremen, deprived plaintiff of his right to trial by jury when the confused and misdirected jury answered the three special interrogatories for defendant.

At the close of proof defendant withdrew its defense of contributory negligence. Plaintiff's timely motions for a directed verdict and for Judgment N.O.V. were denied. Defendant's motion for a directed verdict was granted in part by deleting all testimony and proof of the adverse weather conditions and ice atop a metal container next to one being discharged, from which the plaintiff, an employee of Pittston, was caused to be precipitated sixteen feet to the deck below after being struck by an unsecured bridle operated by Hoffman's shore based crane.

The issues presented are as follows:

1. Where an icy and slippery surface of steel containers to be discharged from the exposed main deck was stated by plaintiff to be a cause of his sixteen feet fall from the unprotected edge when struck by the spreader-bridle, did the trial Court commit reversible error by directing the jury to disregard the overwhelming proof by all witnesses, corroborated by the ship's log, of a condition of danger ripened into unseaworthiness by the purported negligence of a shore-based crane operator?

On cross-examination at trial the following is recorded:

> "Q. Now, Mr. Revilla, was there anything else that *caused* you to fall over the side of that container down to the deck besides being hit in the stomach by the bridle? A. There was ice and water, quite a bit". (135A, 136A) emphasis added.*

The trial Judge struck all testimony and proof on the weather conditions and ice on the metal container where plaintiff was compelled to walk and work;

". . . by reason of the fact that no proof of proximate cause has been shown as to this feature" (163A).

This erroneous restriction of proof is also related to the trial Judge's refusal to pertinently specify and instruct the jury that cargo unsafe to work upon can be a condition for unseaworthiness (228A, 229A).

2. Though defendant withdrew its affirmative defense of contributory negligence (170A), the trial Court nonetheless instructed the jury on this abandoned defense and compounded the error by instructions on the discredited common-law principle of assumption of risk (206A, 207A).

After instructing the jury that a longshoreman, when he enters upon his calling "must assume all inherent and unavoidable risks of his occupation" (207A), he continued as follows:

> "If you should find from a preponderance of the credible evidence that negligence on the part of the stevedoring company, or its employees, *including the plaintiff*, was the sole, that is, the only, proximate

* Numbers in parentheses with suffix A are page references to the appendix. The entire transcript of the trial is reproduced in the joint appendix.

cause of the accident, then the plaintiff cannot recover from the defendant shipowner on his negligence claim" (207A, 208A, emphasis added).

After the Charge, plaintiff's counsel excepted and the following ensued:

> "Mr. Klonsky . . . There is no contributory negligence in this case. . . ."
>
> The Court: He should still look before he acts.
>
> Mr. Klonsky: If he failed to look and therefore was hurt, that is contributory negligence.
>
> The Court: What do you say, Mr. Watson?
>
> Mr. Watson: I don't think the two are necessarily tied together. The fact that I have withdrawn the claim of contributory negligence doesn't mean that the plaintiff is free to lollygag around with his eyes shut to what you call obvious conditions.
>
> The Court: I have noted your exception" (221A, 222A).

Plaintiff was doubly aggrieved in that his request for leave to comment in summation on this abandoned defense was circumvented by the trial Judge's assurance that he would make mention thereof (171A, 173A), which he did (175A), but effectively negated by his Charge in chief.

3. Did the trial Court erroneously limit the meaning and effect of the shipowner's obligation to initially respond in liability to the stevedore's failure to provide plaintiff and his co-workers with extra length ropes to permit control of the bridle and the twist locking ropes from the sanctuary of the deck instead of the slippery container surface in proximity to a cargo operation which the crane operator could not visualize, where no deck gear or equipment could be fouled by longer lines? (127A).

Special interrogatory 3, directed to this issue was stated by the trial Judge to be plaintiff's contention, erroneously limited by the trial Judge's comment to the jury.

"Just what that meant, I don't know that I can state" (201A) and "He said that there were no tag lines. However, as I recall it, there was no proof from the plaintiff that tag lines were necessary or were used on board any other vessel" (214A). Exception was taken (224A). The error is compounded when we look at the record of attempted testimony on this precise subject by the signalman and plaintiff's partner, rejected by the trial Judge (57A, 57A-1, 82A, 85A). Plaintiff also testified "If they had the tag line on the bridle the way they were supposed to have had it, I would not have fallen" (133A).

Statement of the Case

This is an appeal from a judgment based on special interrogatories where a grievously injured plaintiff, as a longshoreman, brought suit for maritime negligence and breach by the defendant of its absolute, continuing and non-delegable obligation of seaworthiness. In turn the defendant as shipowner, brought third-party actions for indemnification against the stevedore-employer of plaintiff, Pittston, and the owner-operator of a shore crane in the discharge of containers, Hoffman. The accident occurred aboard the C/V SEA WITCH on February 19, 1969, recorded in the deck log at 4:30 p.m., as follows:

> "Man claims after hooking up container on deck which was being lifted by shore crane the container turned, man grabbed a rope on lifting gear to avoid being knocked off container. The rope was wet and the man's hand slipped off rope causing him to fall off container two high to deck. Ridel C. Revilla removed

by ambulance to St. James Hospital, Jefferson St., Newark," (Pl.'s exhibit 1, reproduced at 250A).

With respect to the conditions that prevailed on February 19, 1969 while the vessel was at Port Newark, starboard side to Shed 29 for the discharge of containers, the following log entries are noted:

"0800—1 gang longshoremen abd: 0845 comm disch #2 Dk Bay—Hoffman Crane"
"1300—1 gang abd standing by—Rain—Snow . . ."
"1545—1 gang resume discharge #2 dk".

Plaintiff's exhibit 3 reproduced at page 251A is the manufacturer's diagram of the bridle, described as "top lift semi-automatic by means of spreader twist locks", with 2 hanging lines marked "a" and "b", being the twist ropes, and at the bottom left hand portion of the exhibit, in a circle and indicated by the letter "B" is a diagram of the spreader twist locks for each corner of a container, to lock the bridle to the container upon manipulation of the twist ropes. (49A-51A)

Besides plaintiff, two fact witnesses and a meteorologist were called in plaintiff's case. After their testimony was concluded, all other parties rested and on defendant's motion for a directed verdict the trial Court partially granted the motion by excising "any claim . . . based upon the weather conditions . . .". Later the Court directed the jury during plaintiff counsel's summation "as a matter of law, it is out", referring to the slippery condition on top of the container from which the plaintiff fell. (193A)

Angel Canales, the signalman for the stevedore at the time of the accident, a longshoreman for over 18 years (39A), described the conditions of the deck and container. He was corroborated in major part by Rafael Martinez, a

longshoreman with 10 years experience (72A), who worked with the plaintiff on top of the container from which the plaintiff fell. The third witness, Walter Zeltmann, a qualified meteorologist, had all of his testimony on the adverse weather conditions stricken at the close of plaintiff's case. The three special interrogatories propounded by the Court, answered in the negative by the jury, in the light of the trial Judge's rulings and instructions, are as follows:

1) Has plaintiff proved by a fair preponderance of the credible evidence that the defendant-shipowner was negligent in permitting cargo to be discharged in a hazardous manner, with respect to operation of the bridle, from the deck of the C/V SEAWITCH on February 19, 1969, and that such negligence was a proximate cause, in whole or in part, of an accident sustained by plaintiff on February 19, 1969?

2) Has plaintiff proved by a fair preponderance of the credible evidence that continued negligent conduct (that is, other than a single isolated act of negligence) of any person engaged in the discharge of container cargo from the deck of the C/V SEAWITCH on February 19, 1969 created a condition of unseaworthiness and that such unseaworthiness was a proximate cause, in whole or in part, of an accident sustained by the plaintiff on February 19, 1969?

3) Has plaintiff proved by a fair preponderance of the credible evidence that at about 4:15 p.m. on February 19, 1969, the C/V SEAWITCH was unseaworthy because of any failure of the defendant shipowner to provide proper equipment which was reasonably fit for the purpose of discharging cargo and that such unseaworthiness was a proximate cause, in whole or in part, of an accident sustained by the plaintiff on February 19, 1969? (258A, 259A)

Manner of Happening of the Accident

Canales testified there were four containers left on the offshore square of the hatch for discharge at the time of the accident. Two twenty-foot containers were atop the other two, each eight feet high, a total height of 16 feet. It was his function to signal by hand for the shore based crane operator to move the cable and the boom of the crane, separately or together. He had not yet signaled to move the bridle and the container. This bridle had been brought by the crane's boom to fit squarely on top of the container to be discharged (49A) and the four corners were yet to be locked by pulling a rope shown in plaintiff's exhibit 3 (50A-52A). These two ropes came with the bridle (52A). It was the function of the person on the adjoining container once the spreader came down, to "haul it with their hands to put it in place" (54A, 55A). He did not see the accident happen and he had not yet given a signal to the crane operator when the plaintiff fell from the forward part of the container adjoining the one to be discharged (59A).

Martinez, plaintiff's partner, saw the bridle move and the plaintiff fall when the metal container was not yet locked to the bridle (78A). It was plaintiff's job at the time to pull the twist rope so as to lock the bridle to the container (87A). Though he did not see plaintiff struck "because I was on the opposite corner from him", he did see the bridle move (89A).

The plaintiff testified during cross-examination at the time of trial that when about 3 feet from the edge of the container he was struck in the stomach by the bridle, causing him to go over the side and fall 16 feet to the deck below (136A). He was asked the following by Mr. Watson:

"Q. Now, Mr. Revilla, was there anything else that caused you to fall over the side of that container down to the deck besides being hit in the stomach by the bridle? A. There was ice and water, quite a bit." (136A).

Defendant's counsel then referred to the examination of the plaintiff before trial when the answer was different to a similar question, as follows:

"Q. Was there any other cause or any other reason why you fell off the top of the container?" A. No sir, I saw nothing else". (138A).

Plaintiff had not read or corrected his deposition (138A, 139A), and confessed confusion at the time of the examination before trial as to weather conditions (141A, 142A).

Weather Conditions at the Time of the Accident

The ship's log recorded that at 11:45 a.m. all work was stopped, and that at 1:00 p.m. just one gang was standing by during rain and snow, and resumed discharging from the #2 deck at 3:45 p.m.

Zeltmann, a qualified meteorologist (97A, 98A), testified on certified weather bureau records of February 19, 1969 in the area of Port Newark, New Jersey. At Jersey City, 5½ miles from Port Newark, beginning at 9:00 a.m. and continuing past midnight, there was sleet, hail, rain and snow with a temperature range of 31° to 36° (101A). From the Newark Airport, 1½ miles away at 2:52 p.m., light rain and snow was recorded with a temperature of 35° and northwest winds at 14 knots with light rain and sleet and snow recorded from 12 noon to 3:45 p.m., precipitation ending at 4:25 p.m. (102A, 103A, 104A). At about 3:52 p.m. the wind was from north to northwest at 18 knots with gusts of 25 knots (105A).

This is corroborated by Canales who testified the weather was real "windy" with snow, hail and rain and that on top of the container where plaintiff worked there was "ice" (43A). This was stricken by the trial Judge because Canales was on deck at the time and the condition of the deck is not "proof of what is on the container" (44A, 45A). The top of the container was metal (96A). Martinez testified there was ice on the container whereon he was located with the plaintiff and that the weather that afternoon was "very bad" (73A, 74A). As to the icy condition it was "very dangerous to work" (75A, 76A). He described the condition on the top of the container from which plaintiff fell was "like frozen water" (82A).

Equipment Not Provided for a Safe Cargo Operation Under Prevailing Circumstances

No sawdust or sand was requested or provided either by the stevedore or the shipowner (76A, 95A).

As to the use of tag lines for positioning the bridle over the container and locking the corners by manipulating from the deck instead of atop the slippery container in dangerous proximity to the movement of the bridle and the container, attached or unattached, the trial Judge commented "There hasn't been any evidence on that before me today" (160A), a misconception that persisted through the Charge (201A, 232A).

Canales testified that tag lines are "usually attached to a spreader in order to control from the . . . deck of the ship" (56A); that none were provided that day, and despite his 18 years experience as a longshoreman, was not permitted to respond to ". . . under the circumstances of this case whether tag lines were required?" (57A-1). On

cross-examination Canales testified that tag lines were stevedore's equipment that had been used on prior occasions, and his opinion that discharging the containers without tag lines was unsafe, was stricken (64A).

Martinez also testified as to the need for tag lines and longer rope for extension of the twist ropes so longshoremen would more safely manipulate them from the deck, but in the main this testimony was also stricken (82A-85A, 91A). The plaintiff likewise was prevented from giving testimony on the use of longer lines to reach the men on deck (148A, 151A, 152A). When plaintiff's counsel asked leave to be heard on the motion to strike, this was refused, the Court stating "No, you are not going to be heard . . . I have heard enough". (152A).

Plaintiff's contention that the shipowner must first respond in liability on its non-delegable obligation to a longshoreman on the failure to provide needed equipment for the safe performance of his work, even if it be stevedore equipment in the nature of tag lines and rope, was denied. (63A, 94A, 189A, 223A, 225A-228A).

The jury during deliberation requested "further clarification on the legal point of seaworthiness of a vessel discharging cargo in port", and "what constitutes proper equipment for the discharge of cargo under the circumstances . . ." (234A).

As to the request for clarification on proper equipment "under the circumstances described during the trial", the trial Judge stated: "You heard the testimony and I can't tell you. I indicated some uncertainty about that during my charge" (238A, 239A). As to the meaning of the warranty of seaworthiness during cargo operations in port, the court reporter was directed to read from the Charge already given (245A), whereby the refusal to instruct that

unseaworthiness includes cargo unsafe or unfit to work upon during cargo operations in port was more significant by the Jury's request. (228A, 229A).

ARGUMENT

POINT ONE

The court below erred in removing from the jury the factual issue of the weather conditions and ice on the slippery container surface as a proximate cause of the accident.

Though there was a judgment for the defendant predicated on three special interrogatories to the jury, it is plaintiff who was deprived of trial by jury, and appeals on the ground that issues of fact were erroneously removed from the jury's consideration when the defendant's motion for a directed verdict was granted in part. Whether the conditions of the weather and the surface of the container were causally related to the accident involved herein, as plaintiff testified at trial, should have been left to the jury. What may have motivated the trial Court to remove the issue and relationship of the weather conditions from the case, though not specifically stated, is the contradictory testimony on the same question given by the plaintiff at his examination before trial. Clearly, this conflict and the reasons therefor were for the jury to decide. See: *Anderson* v. *Great Lakes Dredge & Dock Co.*, 509 F. 2d 1119 (1974), where this Court recently held that a conflict between plaintiff's actual testimony at trial and an examination before trial should be remanded for jury resolution.

Anderson, supra, is also in point on plaintiff's contention that the trial Judge openly and obviously to the jury favored defendant's case, on which plaintiff's counsel ex-

cepted and sought a mistrial before the jury retired to deliberate (223A, 231A).

In *Imbriale v. Skidmore*, 252 A.D. 884, 300 N.Y.S. 4, it was held that where the condition is kinetic, as here, the plaintiff would not be bound to testimony of no other cause as "the occurrence may have been so sudden that the plaintiff, preoccupied with the work he was doing. . ." did not exactly see what occurred (p. 5 of 300 N.Y.S.). In accord: *Burd* v. *Bleischer*, 208 A.D. 499, 203 N.Y.S. 754.

By removing the unsafe condition of the cargo surface as a factor that would be related to the negligence of a crane operator, and bring into play an unseaworthy condition, the trial Court set the stage for a failure of liability based on a "single isolated act of negligence" (258A, second special interrogatory). Instead the Court below effectively brought into play the oft-cited *Usner* v. *Luckenbach*, 400 U.S. 494, 500, 91 S. Ct. 514, where the proof was solely ". . . the isolated personal negligent act of the petitioner's fellow longshoreman", unrelated to the ship's condition, appurtenances, her cargo or her crew.

Mr. Justice Stewart also wrote that this decision does not change the maritime law as it has developed to date, as follows:

> "The present case, however, offers no occasion to reexamine any of our previous decisions. We may accept it as fully settled that a shipowner's liability for an unseaworthy vessel extends beyond the members of the crew and includes a longshoreman like the petitioner. We may accept it as settled, too, that the shipowner is liable though the unseaworthiness be transitory, and though the injury be suffered elsewhere than aboard the vessel". (pp. 497-498 of 400 U.S.)

What has been done in *Usner, supra,* is to express a distinction between negligence and unseaworthiness, the latter requiring a *condition,* with liability predicated on how that condition came into being, ". . . whether by negligence or otherwise". *Grillea* v. *U.S.A.,* 232 F. 2d 919 appears revived on the original meaning of operational negligence. The decisional examples cited in *Usner, supra,* are the leading cases that have expanded the warranty and inclusion of longshoremen as *pro hac vice* seamen. It ostensibly reaffirms this non-delegable, continuing and obsolute obligation of the shipowner as a species of liability without fault, and without loss of its vigor and effect.

The *Usner* opinion also agrees liability follows where "The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service." (p. 499 of 400 U.S.)

This Court in *Siderewicz* v. *Enso-Gutzeit O/Y, Finn Lines, Ltd. O/Y et al.,* 453 F. 2d 1094, assessed the meaning of *Usner, supra,* as follows:

> "The first issue is whether a *prima facie* case was made that the technique of unloading was improper. If so, a jury question of unseaworthiness has been presented; the Supreme Court reiterated in *Usner* v. *Luckenbach Overseas Corp.,* 400 U.S. 494, 499, 91 S. Ct. 514, 27 L.Ed. 2d 562 (1971), that a ship's unseaworthy condition could arise from an improper method of loading her cargo, and an improper method of unloading falls into the same class. *Gutierrez* v. *Waterman S.S. Co.,* 373 U.S. 206, 211-215, 83 S. Ct. 1185, 10 L.Ed. 2d 297 (1963); *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines, Ltd.,* 369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 2d 798 (1962)." (p. 1095 of 453 F.2d).

Where the trial Judge directed a verdict for the defendant on the ground that "the elements of a viable claim had not been established and there was unsufficient evidence to go to the jury," this Court reversed and held: ". . . unseaworthiness and proximate causation, the jury could reasonably find either way, and a direction for defendants could not properly be made" (case cited). The facts in the instant case are *a fortiori* to those in *Siderewicz.*

In assessing the testimony of witnesses and where the findings are clearly erroneous, it is axiomatic that any testimony or finding that is contradicted by incontrovertible physical facts must be rejected. *Baltimore & Ohio RR* v. *Muldoon,* 102 F. 2d 151; *Goehrig* v. *Stryker,* 174 F. 897; *Wood Towing Corp.* v. *Paco Tankers,* 152 F. 2d 258. The law has never authorized the drawing of one inference from another in disregard of existent facts. *Home Insurance Co.* v. *Weide,* 78 U.S. 438.

It is axiomatic that cargo unsafe to work upon makes the place of work unsafe. In *Anderson et al.* v. *Lorentzen et al.,* CCA 2nd, 160 F. 2d 173, 174, 175, this Court rejected an argument that a longshoreman could not recover for dermatitis caused by leaking steel drums containing cashew nut oil on the ground that the stevedore employer knew this liquid was a corrosive and kept the special cream on deck for the employees, as follows:

> "The defendants-appellants have argued that, since the employer of the stevedores who unloaded the liquid was aware of the danger, they were under no duty to warn those who worked for that independent contractor. We cannot agree . . . This duty was non-delegable and persisted despite any concurrent duty on the part of the stevedoring company (cases cited). . . . *Cargo which was unsafe to work upon made the place of work unsafe".* (Emphasis added).

A cargo container that leaks is unsafe and unseaworthy. *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206, 83 S. Ct. 1185.

The character of the duty relates itself as well to a transitory slippery condition on a ship's railing, as in *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 339, 80 S. Ct. 926, where the duty was defined as follows:

> ". . . the character of the duty . . . is 'absolute. It is essentially a species of liability without fault, analogous to other well-known instances in our law . . .' The decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care . . ."

In *Pisano* v. *Yamashita Shinnihon Kisen et al.*, 1974 A.M.C. 1755 (not officially reported), Hon. Murray I. Gurfein of this Court, held that an icy deck of a floating crane not owned by the shipowner nonetheless prompts the warranty of seaworthiness in favor of a longshoreman who slipped while crossing from the steamship to the lighter.

Also see *Ah Lou Kou* v. *American Export Isbrandtsen Lines*, 513 F.2d 261, where this Court reversed the trial Court's dismissal of a negligence claim on "rough weather theory" which this unanimous Court stated should have gone to the jury.

Also important to the instant appeal is this Court's disposition of the *Ah Lou Kou* case, involving a conflict in evidence on "the accuracy of the statement signed by the appellant", that should be resolved by the jury without the trial Court exceeding the "bounds of fair comment on the evidence" (p. 262 of 513 F. 2d).

Respectfully, Judge Levet exceeded the errors charged to the *Ah Lou Kou* trial Judge and should likewise be reversed for denying plaintiff a fair trial by jury.

POINT TWO

Though the defense of contributory negligence was abandoned the court below erroneously instructed the jury on this under the guise of assumption of risk.

The record is replete with error on the discredited common-law principle of assumption of risk.

The holding of *Beadle* v. *Spencer*, 298 U.S. 124 that a longshoreman's freedom to avoid a risk is far from comparable to a shore-side non-maritime employee, was also observed by this Court in *LaGuerra* v. *Brasileiro*, 124 F. 2d 553, as follows:

> ". . . we cannot say as a matter of law that plaintiff should have stopped work and risked losing his job in order to avoid the chance that he would be injured . . . and if we apply the traditional rule of burden of proof envisaged by Federal Rule 8(c), 28 U.S.C.A. following section 723 . . . it seems quite clear that upon the record at the close of plaintiff's case this burden was in no wise satisfied." (pp. 555, 556 of 124 F. 2d)

We had inherited from the common law the harsh maxim of "volenti non fit injuria" to mean that an injured person is assumed to have given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk. By voluntarily assuming a known risk there was necessarily a bar to recovery, sufficiently harsh to prompt relief in certain fields of tort law, particularly first in railroad personal

injury cases, then adopted by the Jones Act for seamen, and eventually to all maritime workers.

The Court in *Johnson* v. *Erie Railroad Company,* 236 F. 2d 352, reversed a verdict for defendant after studying the Charge and determining that its effect was to prompt the jury to think that assumption of risk was a good defense, contrary to *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U.S. 54, 63 S. Ct. 444.

In *Tiller, supra,* the Supreme Court rejected any limitation on the abolition of assumption of risk in railroad tort cases, recognizing that in common law, assumption of risk applied in the ordinary course of work from accustomed danger, as an absolute bar to recovery, citing *Schlemmer* v. *Buffalo R.,* 205 U.S. 1, 12, 13, 27 S. Ct. 407, 409, as follows:

> "Unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of risk under another name . . ." (p. 58 of 318 U.S.)

The majority opinion in *Tiller, supra,* rephrases this principle on the need for a clear and proper understanding that assumption of risk is no defense in any respect, as follows:

> "No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the Court be submitted to the jury for their determination." (p. 67 of 318 U.S.).

More recently, the Supreme Court in *Palermo* v. *Luckenbach Steamship Co.,* 355 U.S. 20, 78 S. Ct. 1, re-affirmed that a longshoreman does not assume the risk of an unsafe place to work even if the danger is obvious. Contributory

negligence, non-existent here, is confused by the trial Court with the rejected common law defense of assumption of risk.

This Court in *Rivera* v. *Farrell Lines,* 474 F. 2d 255, opinion by Oakes, C.J., referred to the *Tiller* case and stated:

> ". . . first issue before us is whether the Charge permitted assumption of risk to go to the jury in the guise of contributory negligence".

This Court should conclude in the instant case that the Charge did permit error in this regard, confusedly intermingling the outmoded concept of assumption of risk with contributory negligence, as if contributory negligence had not been removed as an affirmative defense.

POINT THREE

The court below erred in limiting the shipowner's initial non-delegable obligation that a longshoreman be supplied needed equipment by itself or the stevedore under the circumstances involved herein.

Though the major thrust of the defense was that the plaintiff should have sued Hoffman directly, despite being subject to a claim over if the plaintiff prevailed, the Court below refused plaintiff leave to refer to the status and initial liability of the shipowner on its non-delegable, absolute and continuing obligations. The shipowner was the proper party defendant and would be a conduit for imposition of ultimate liability on the responsible third-party defendants.

In *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.,* 10 F. 2d 47 (C.C.A. 2d, Dec. 1925), Learned

Hand, C.J., wrote that a seaman ordered upon deck cargo without being provided a guard line was deserving of jury determination without an expert's opinion, as follows:

> "Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the defendant on this issue, as well as on the issue of the absence of the line." (p. 48 of 10 F. 2d).

Augustus N. Hand, C.J., in *Kennair* v. *Mississippi Shipping Co., Inc.,* 197 F. 2d 605 held for a seaman who fell through an unlighted elevator shaft by affirming a jury verdict predicated on the absence of an indicator or other device on deck to show where the elevator was at a given time. A similar contention to that involved herein was answered as follows:

> "It is urged by the defendant that there is no evidence in the record as to what type of safety device a reasonably prudent shipowner would have, nor any evidence as to what precautions were taken on other vessels. But such evidence was not necessary; for it was the function of the jury to apply the standard of care—what was reasonable under the circumstances—to the facts presented to it. *Bailey* v. *Central Vermont Ry., Inc.,* 319 U.S. 350, 353, 63 S. Ct. 1062, 87 L. Ed. 1444" (p. 606 of 197 F. 2d). See: *The Leontios Teryazos,* 45 F. Supp. 618,622.

In Gutierrez v. *Waterman Steamship Corp.,* 373 U.S. 206, 213, 83 S. Ct. 1185, 1190, the Supreme Court said:—

> ". . . seaworthiness is not limited, of course, to fitness for travel on the high seas; it includes fitness for load-

ing and unloading. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872."

It has also been held that when cargo was stowed unevenly in the hold, a longshoreman injured thereby may recover for unseaworthiness. See, *Richard* v. *Ellerman & Bucknall Steamship Co.,* 278 F. 2d 704, 706; *Palazzolo* v. *Pan-Atlantic Steamship Corp.,* 211 F. 2d 277, 279, aff'd on other grounds, 350 U.S. 124; see (dictum) in *Morales* v. *City of Galveston,* 370 U.S. 165, 170, 82 S. Ct. 1226, 1229:

> "A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The *method* of loading (or unloading) her cargo, or the manner of its stowage, might be improper. (Citing cases) *For any or all of these reasons, or others,* a vessel might not be reasonably fit for her intended service". (Emphasis supplied).

Italia Societa v. *Oregon Stevedoring Company,* 376 U.S. 315, 323, 84 S. Ct. 748 concerned defective rope supplied by the stevedore for which the shipowner on its nondelegable obligation was held initially liable though "the stevedoring operations in the course of which the longshoreman was injured were in the hands of the employees of Oregon." (p. 322 of 376 U.S.)

In *Martinez* v. *Compagnie Generale Transatlantique, et al.,* 517 F. 2d 371, the Court held it immaterial for shipowner liability as to who was to furnish the needed equipment for a safe cargo operation.

CONCLUSION

The Court below erred in multiple respects to effectively deny plaintiff his right to trial by jury under the principles

of law in effect prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Act. He is deserving of a directed verdict or judgment N.O.V., with the case remanded solely on the issue of damages, or in the alternative, a New Trial by a different trial Judge.

Respectfully submitted,

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Attorneys for Plaintiff-Appellant

Robert Klonsky
On the Brief

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29 day of March 1976
Fogarty McLaughlin & Gernel
ATTORNEYS FOR Pittston Stevedoring Corp.

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